

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORIO ALONZO HERNANDEZ,

Defendant.

Case No. 2:10-CR-245-KJD

ORDER

Before the Court is Defendant Gregorio Alonzo Hernandez's ("Defendant") first Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. §2255 (#47).

I. Grounds One and Two: Fourth Amendment Violations

In Ground One, Defendant alleges that his conviction was based on evidence obtained in an unconstitutional search and seizure. In Ground Two, Defendant alleges that his conviction was based on evidence obtained via an unlawful arrest. Here, it is important to note that Defendant entered a guilty plea (#52; 16:22-25).

The Government correctly asserts that

a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred

1 prior to the entry of the guilty plea. He may only attack the voluntary and intelligent
2 character of the guilty plea.

3 Tollett v. Henderson, 411 U.S. 258, 267 (1973). Accordingly, no relief is possible on Grounds One
4 or Two.

5 II. Ground Three: Ineffective Assistance of Counsel

6 There are two components to an ineffective assistance of counsel claim. First, that
7 defendant's counsel's representation fell below an objective standard of reasonableness, which
8 "requires showing that counsel made errors so serious that counsel was not functioning as the
9 'counsel' guaranteed the defendant by the Sixth Amendment. Strickland v. Washington, 466 U.S.
10 668, 687 (1984). Second, that this deficient performance prejudiced the defense such that the result
11 of the trial is unreliable. Id.

12 As to deficient performance, "[j]udicial scrutiny . . . must be highly deferential. . . . [A] court
13 must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable
14 professional assistance; that is, the defendant must overcome the presumption that, under the
15 circumstances, the challenged action might be considered sound trial strategy." Id. at 689 (internal
16 quotation omitted). "The question is whether an attorney's representation amounted to incompetence
17 under prevailing professional norms, not whether it deviated from best practices or most common
18 custom." Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (internal quotation omitted) citing
19 Strickland, 466 U.S. at 690. This is an objective rather than a subjective standard. See Harrington v.
20 Richter, 131 S. Ct. at 790.

21 As to prejudice, "[i]t is not enough to show that the errors had some conceivable effect on the
22 outcome of the proceeding. Harrington v. Richter, 131 S. Ct. 770, 787, (2011) citing Strickland, 466
23 U.S. at 693 (internal quotation omitted). "Counsel's errors must be so serious as to deprive the
24 defendant of a fair trial, [meaning] a trial whose result is reliable." Harrington, 131 S. Ct. at 787-88
25 (internal quotation omitted) citing Strickland, 466 U.S. at 687.

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1 A. “Forced” to Enter a Guilty Plea

2 A guilty plea is valid only if it is “a voluntary and intelligent choice among the alternative[s] .
3 . . . open to the defendant.” United States v. Signori, 844 F.2d 635, 638 (9th Cir. 1988) quoting Hill v.
4 Lockhart, 474 U.S. 52, 56 (1985). “A defendant who pleads guilty upon the advice of counsel may
5 only attack the voluntary and intelligent character of the guilty plea by showing that the advice he
6 received from counsel was not within the range of competence demanded of attorneys in criminal
7 cases.” Signori, 844 F.2d at 638. However, encouraging his client to plead guilty is well within the
8 acceptable range of competence for the reasons presented by Counsel in his affidavit (#55; ¶¶21-30).
9 By way of brief summary, Counsel did not believe that Defendant could prevail in any substantive
10 pretrial motions (#55; ¶20); use of Defendant’s children as eyewitnesses was thought unduly risky as
11 Defendant used his children as decoys in drug runs (#55; ¶22, 26); the amount and purity of the drugs
12 were strongly aggravating (#55; ¶23). Accordingly, the advice to plead guilty was well within the
13 range of acceptable competence.

14 Further, “[s]tatements made by a defendant during a guilty plea hearing carry a strong
15 presumption of veracity in subsequent proceedings attacking the plea.” United States v. Ross, 511
16 F.3d 1233, 1236 (9th Cir. 2008). Accordingly, courts are “entitled to credit [a defendant’s] testimony
17 . . . over her subsequent affidavit.” United States v. Castello, 724 F.2d 813, 815 (9th Cir. 1984).
18 Looking to the Change of Plea proceedings, the Court engaged in a detailed inquiry where the
19 Defendant stated to the Court that, in effect, his plea was entered into voluntarily and intelligently
20 (#52). For example, on page 10 and 11 of the transcript:

21 THE COURT: Has anyone threatened you or forced you to
22 plead guilty?

23 THE DEFENDANT: No.

24 THE COURT: Are you pleading guilty because of any threats
25 or coercion from codefendants or third parties?

26 THE DEFENDANT: No.

THE COURT: And do you agree that everything that has induced you to plead guilty is included in writing in the plea agreement?

THE DEFENDANT: Yes.

On page 13:

THE COURT: Have you and Mr. Momot discussed the United States Sentencing Guidelines and how those might apply to the facts of your case?

THE DEFENDANT: Yes.

Further, the Court inquired as to the facts undergirding Defendant's plea (#52; 14:18-16:6). Finally, on page 16:

THE COURT: Are you pleading guilty because in truth and in fact you are guilty and for no other reason? (Attorney-client discussion.)

THE DEFENDANT: Yes.

Finding no evidence whatever that the plea was not voluntary and intelligent, and in light of the strong presumption of verity regarding Defendant's statements, the Court finds that no relief is available on this ground.

B. Failure to Make Pretrial Motions

Defendant alleges that his Counsel was ineffective in failing to make any pretrial motions regarding the allegedly pretextual traffic stop and warrantless search. However, this decision was made deliberately (#55; ¶15) and in promotion of Defendant's interests. Defendant's counsel avers that the filing of pretrial motions was unlikely to succeed. (#55; ¶20). Further, such filing "could possibly aggravate the situation and would have frustrated any further negotiations" (#55; ¶21). Counsel then spends the next two pages of his affidavit laying out in detail the sound rationale

1 behind his decision, only some of which was addressed by the Court under sub-A. (#55; ¶¶21-30).
2 Given the high degree of deference accorded for tactical decisions, and given the reasonable rationale
3 put forth in Counsel's affidavit, the Court cannot and will not engage in second-guessing.
4 Accordingly, Defendant cannot demonstrate deficit performance and so cannot make out a claim for
5 ineffective assistance of counsel on this ground. While the Court does not and need not reach the
6 issue of prejudice, it appears to the Court that Defendant almost certainly received a far lesser
7 sentence than he would have at trial (#55; ¶29).

8 III. Ground Four: Advised that His Case was "Unappealable"

9 Defendant claims that Counsel advised Defendant that his case was unappealable. However,
10 Defendant's Counsel denies this allegation (#55; ¶34). Further, Defendant was advised by the Court
11 on several occasions of his right to appeal. Defendant was advised of his appealable claims during
12 the Change of Plea proceeding (#52; 12, 13). Defendant was advised regarding his right to appeal
13 during sentencing (#53; 19). In fact, the Court explicitly told Defendant "Mr. Hernandez, if you wish
14 to appeal, you'll need to notify the court and the court clerk will designate an attorney to represent
15 you on appeal if you wish to exercise any right of appeal." (#53; 19-20). Accordingly, as the record
16 conclusively refutes Defendant's claim, no relief is available on this ground.

17 IV. Conclusion

18 Accordingly, as Defendant has not provided any viable grounds, Defendant's Motion to
19 Vacate, Set Aside, or Correct Sentence under 28 U.S.C. §2255 (#47) is **HEREBY DENIED**.

20 DATED this 7th day of November 2013.

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24 Kent J. Dawson
United States District Judge
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